

(2009) 08 GAU CK 0068

In the Gauhati High Court

Case No : Regular Second Appeal No. 8 of 2007

Dr. Atul Sarma

APPELLANT

Vs

Bhaben Chandra Pegu

RESPONDENT

Date of Decision : 19-08-2009

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 26 Rule 9, 100, 75
Criminal Procedure Code, 1973 (CrPC) — Section 144

Citation : (2011) 1 GLR 767

Hon'ble Judges : P.K. Musahary, J

Bench : Single Bench

Advocate : B.K. Goswami, D. Baruah, D.P. Hazarika, K. Saharia and P.P. Patar, for the Appellant; S.K. Barkataki, D. Sharma and P. Goswami, for the Respondent

Judgement

P.K. Musahary, J.—This second appeal is directed against the judgment and decree dated 28.7.2006 passed by the learned Court of Civil Judge (Senior Division) No. 2, Kamrup, Guwahati in Title Appeal No. 92 of 2005 affirming the judgment and decree dated 30.9.2005 passed by the learned Civil Judge (Jr. Division) No. 2, Kamrup, Guwahati in Title Suit No. 272 of 1996.

2. Heard Mr. B.K. Goswami, learned senior counsel assisted by Mr. D. Baruah, learned Counsel for the Appellant-Defendant and Mr. S.K. Barkataki, learned Counsel for the Respondent-Plaintiff.

3. The Respondent-Plaintiff instituted Title Suit No. 272 of 1996 for declaration of right, title and interest over the suit land shown in the schedule to the plaint and confirmation of possession and permanent injunction. The Respondent-Plaintiff's case is that he purchased the suit land measuring 2 Kathas, 11 Lechas under Dag No. 292 covered by K. Patta No. 144 situated at Village-Hengrabari under Beltola Mauza by executing a registered sale deed on 17.6.1980 from one, Shri Lahon Garo and took possession thereof on the same day of purchase in presence of Babul Ali, Lahon Garo, Sadek Ali and other neighbouring people. He got his name mutated and, thus, he has been in continuous physical possession

over the said land through the sons of Babul Ali. The said Babul Ali had a plot of land adjacent to the suit land and the Plaintiff purchased about 18 Lechas of the aforesaid land from him. On 27.3.1996, the Appellant-Defendant, with some other persons, came to the suit land and asked Babul Ali and his family to vacate the suit land. On 29.3.1996, the Appellant-Defendant came to the suit land and made preparation for construction of boundary wall. The Respondent-Plaintiff instituted a proceeding u/s 144 of the Code of Criminal Procedure and subsequently instituted the Title Suit.

4. The Appellant-Defendant contested the suit by filing a written statement raising the statutory grounds of limitation, non-joinder of parties, estoppel, waiver and acquiescence. He also pleaded that he purchased a plot of land measuring 4 kathas, 6 lechas by way of executing the registered sale deeds No. 5112 dated 6.6.1981 and No. 5114 dated 16.6.1981 at Village-Hengrabari under Beltola Mauza in the district of Kamrup covered by K. Patta No. 144, Dag No. 292 (Part Dag No. 665). He got his name mutated for the said land vide Mutation Case No. 771/84-85. The Defendant denied right, title, interest and possession of the Respondent-Plaintiff over the suit land through the sons of Babul Ali. According to the Appellant-Defendant, the land revenue staff led by senior ASO, demarcated the suit land and delivered physical possession to him on 27.2.1996 and thereafter he raised boundary wall under police protection. But subsequently the Respondent-Plaintiff in collusion with others instituted proceeding u/s 144, Code of Criminal Procedure and taking advantage of the order of status quo, started construction of RCC building over the suit land and prayed for dismissal of the suit with cost.

5. The learned trial court framed the following issues -

- (1) Whether the suit is maintainable in the present form?
- (2) Whether there is cause of action for the suit?
- (3) Whether the suit is barred by law of limitation?
- (4) Whether the Plaintiff had purchased a plot of land measuring 2 Kathas, 11 Lechas of Dag No. 292 covered by K. Patta No. 144 situated at Village Hengrabari under Beltola Mauza by way of registered sale deed dated 17.6.1980?
- (5) To what relief, if any, the Plaintiff is entitled?

The learned Court of Civil Judge (Junior Division) No. 2 Kamrup, Guwahati, after trial, decreed the suit. On appeal, the judgment and decree was upheld by the learned court of Civil Judge (Senior Division) No. 2, Kamrup, Guwahati. Hence, this appeal.

6. The present appeal has been admitted by this Court on 12.1.2007 to decide the following substantial questions of law: -

- (1) Whether the learned First Appellate Court was justified in coming to a conclusion that the suit was maintainable in absence of the vendor of the Plaintiff

and the Defendant and the co pattadars?

(2) Whether the judgment and decree dated 28.7.2006 passed by the learned First Appellate Court suffers from perversity in law by not taking into account the various pleadings and the relevant evidence on record?

(3) Whether the learned First Appellate Court was justified in confirming the judgment and decree in favour of the Plaintiff without appreciating the evidence as required as per the provisions of law?

7. Mr. Goswami, learned senior counsel for the Appellant/Defendant makes the following submissions -

(i) The courts below failed to appreciate that the suit was not maintainable in view of the non joinder of necessary parties, i.e., one Sri Nar Bahadur Chetri, a co-pattadar. He is also shown as one of the co-pattadars of the suit patta being K. Patta No. 144 of Hengrabari Gaon under Beltola Mauza.

(ii) The learned appellate court below failed to appreciate the evidence on record that Sri Lahon Garo, vendor of both the Plaintiff and the Defendant, was the owner of the entire land included in Dag No. 292, out of which, only some area was acquired for Oil India Pipe Line thereby bifurcating the land of the vendor into two parts, one measuring 4 kathas, 6 lechas, which falls on the northern side of the pipeline and the other part measuring 2 kathas 11, lechas, which falls on the southern side of the pipeline and under such circumstances, the learned appellate court below ought not to have come to a conclusion that the land measuring 2 kathas, 11 lechas, which was the suit land/fell on the northern side of the pipeline. This aspect of the matter was clarified as per the cadastral map, Exhibit- (Ditiya Sa). It was also clarified in the evidence of the vendor, Lahon Garo, who deposed that "upon the pipeline running through my land, my land was bifurcated into two parts, one measuring 2 kathas, 11 lachas and the other measuring 4 kathas, 6 lechas. I sold to the Plaintiff the land measuring 2 kathas, 11 lechas". But the said evidence was totally overlooked by the learned courts below and as such, the impugned judgment and decree dated 28.7.2006 suffers from errors both in fact and law and as such, it is liable to be set aside and quashed.

(iii) In second appeal, the court is not required to deal with the factual aspect of the matter inasmuch it is required to decide only the substantial questions of law but in a matter where the material fact which goes to the root of the matter has not been considered on appreciation of evidence on record, the court adjudicating the second appeal, can look into such material fact and evidence on record. In other words, failure to decide the core issue gives rise to substantial questions of law and in the present case, according to Mr. Goswami, the learned senior counsel, the core issue is the determination of location of the suit land, i.e., 2 kathas 11 lechas under Dag No. 292 covered by K. Patta No. 144, which the Plaintiff claims to have purchased and took possession thereof. The Defendant filed an application for setting up of commission to ascertain the

actual site on which the pipeline falls in respect of the suit land but the learned trial court, by an order dated 13.11.2000, rejected and thus, the core issue remained undecided. In this respect Mr. Goswami, referred to Achintya Kumar Saha Vs. Nanee Printers and Others, According to him, the learned courts below, particularly, the First Appellate Court, upon which duty has been cast to examine both questions of fact and law, has failed to discharge its duty expected of it. The First Appellate Court, according to him, is the final court of fact and it is also a final court in the sense that its decision on a question of law, even if erroneous, may not be vulnerable before the High Court in second appeal because the jurisdiction of the High Court under the new scheme u/s 100, Code of Civil Procedure, has now ceased to be available to correct the error of law or the erroneous findings of the First Appellate Court even on question of law unless such question of law be a substantial one. The Lower Appellate Court has, thus, failed to discharge the duty assigned to it. In this regard Mr. Goswami has referred to Santosh Hazari Vs. Purushottam Tiwai (Dead) by Lrs., It is also submitted by Mr. Goswami, learned senior counsel that the First Appellate Court is cast with duty independently to apprise evidence in the light of the pleadings, the present being a suit for recovery of possession. Burden is on the Plaintiff to establish his title and he should not take the advantage of the weakness of the defence or on the failure of the defence to establish the title set up by him. The location of the suit land as given in the schedule to the plaint does not tally with the revenue record and the evidence adduced by the Plaintiff does not prove or show exact position of the disputed land. The learned lower appellate court failed to apprise independently the evidence on record and, thus, came to an erroneous finding and conclusion which must be interfered with to set aside the impugned judgment and decree passed by the learned lower appellate court as well as the judgment and decree passed by the learned trial court. In this regard, references has been made to Ramchandra Sakham Mahajan Vs. Damodar Trimbak Tanksale (D) and Others, and Brahma Nand Puri Vs. Neki Puri,

8. Mr. Barkataki, learned Counsel for the Respondent-Plaintiff submits that the Plaintiff duly purchased 2 kathas, 11 lechas of land by executing a registered sale deed on 17.6.1980, whereas the Appellant-Defendant purchased different plot of land measuring 4 Kathas 6 Lechas by executing registered sale deeds in 1981, i.e., subsequent to the purchase of suit land by the Plaintiff. The Plaintiff took the possession of the land measuring 2 kathas, 11 lechas on the same day of execution of the sale deed in presence of the witnesses and subsequently he got the said land mutated in his. But the Defendant was never in physical possession of the suit land. Moreover, the Plaintiff adduced the evidence of Lahon Garo from whom the suit land was purchased as PW2, who categorically deposed that he sold 2 kathas, 11 lechas of land to the Plaintiff. Concurrent finding of facts in regard to purchase of the suit land by a registered sale deed, physical possession of the land by the Plaintiff, mutation effected in the name of the Plaintiff cannot be disturbed in the second appeal. According to Mr. Barkataki, the Lower Appellate Court committed no error in appreciating the evidence on record and

deciding the matter both in fact and law and as such, the present appeal is liable to be dismissed with cost.

9. I have carefully perused and examined the records alongwith the evidence adduced by the parties. As regard the first substantial question of law raised in this appeal, the Defendant pleaded that the Exhibit-3 Jamabandi included the name of one, Nar Bahadur Chetri, alongwith Lahon Garo as a co-pattadar of the Village-Hengrabari Gaon under Beltola Mauza covered by suit Patta No. 144 and the said patta contains in the Dag Nos. 181, 292, 466 and 292, 884 and as such, he is a necessary party and non joinder of the said Nar Bahadur Chetri. In the written statement, the Appellant-Defendant simply stated that "the suit is bad for non-joinder of necessary parties" without saying anything about the aforesaid co-pattadar, Nar Bahadur Chetri. The Appellant-Defendant filed written argument on 2.3.2005 before the learned trial court. On perusal of the same, it is found that the question of non joinder of necessary party has not been raised. Even in the memo of appeal filed before the learned Civil Judge (Senior Division) No. 1, Kamrup, Guwahati, the ground of non joinder of necessary party was not taken. This being the position, it cannot be said that the learned courts below committed an error in not framing any issue on the non joinder of necessary parties. However, while disposing of the appeal, the learned lower appellate court made discussion about the same and came to a conclusion that there is no dispute regarding the land covered by Dag No. 446 and co-pattadar, Shri Nar Bahadur Chetri but he is not a necessary party in the suit inasmuch as, his right, title and interest is not affected, if decree is passed in his absence and accordingly the plea of non joinder raised by the learned Counsel for the Appellant-Defendant was rejected. The conclusion arrived at by the learned appellate court below, in my considered view, is justified inasmuch as the suit land is not at all connected with the land owned and possessed by co-pattadar, Nar Bahadur Chetri and he is not, in any way, affected by the judgment and decree passed by the learned courts below.

10. It is now to examine whether the lower appellate court failed to take into account the various pleadings and appreciate the evidence on record. The pleading of the Plaintiff is that he purchased a plot of land measuring 2 kathas, 11 lechas under Dag No. 292 covered by K. Patta No. 144 from one, Sri Lahon Garo. The Defendant, on the other hand, pleaded that he purchased 4 kathas, 6 lechas of land from the same person named above covered by K. Patta No. 144, Dag No. 292 (Part Dag No. 665).

11. I have perused and carefully examined the certified copy of Jamabandli, Exhibit-(Ungo) in respect of K. Patta No. 144 of Village Hengrabari under Beltola Mauza. From this Jamabandi, it is found that there are 4 co-pattadars and 4 dags. The land in dispute pertains to Dag No. 292 comprising total area measuring 4 kathas, 6 lechas. As per the said Jamabandi, the name of Bhaben Chandra Pegu (Plaintiff) has been recorded as pattadar in respect of land measuring 2 kathas, 11 lechas covered by Dag No. 292 as per order dated

29.3.1982 passed by the Sub-Deputy Collector by virtue of purchase. Again in the same Jamabandi, the name of Dr. Atul Chandra Sarma (Defendant) has been recorded as pattadar in respect of land measuring 4 kathas, 6 lechas covered by Dag No. 292 as per the order dated 1.12.1984 passed by the Sub-Deputy Collector by virtue of purchase what is to be noted is that the vendor, Sri Lahon Garo had only 4 kathas, 6 lechas of land under Dag No. 292. It is, therefore, not understood how he could sale (2 kathas 11 lechas + 4 kathas 6 lechas) = 6 kathas 17 lechas to Plaintiff (Bhaben Chandra Pegu) and Defendant (Dr. Atul Chandra Sarma).

12. There is another aspect of the matter to be noted. A certified copy of the cadastral map in respect of the land in dispute has been produced and exhibited as Exhibit-(Ditiya Sa). In the said trace map, the Dag No. 292 has been shown in the northern side of the pipeline. The vendor Lahon Garo (PW2) testified in his examination-in-chief that there is a pipeline in southern side of the land in dispute. He, however, stated in the cross examination that in the boundary of his plot measuring 4 kathas 6 lechas, there is no land of Babul Ali. But as noted earlier in the "Jamabandi", there is only a plot of land measuring 4 kathas 6 lechas under Dag No. 292, against the pleading of the Plaintiff that the said land measuring 2 kathas 11 lechas is adjacent to the plot of land measuring 18 lechas owned by Babul Ali @ Md. Bafur Ali from whom the Plaintiff purchased the said land. PW2 again stated in examination-chief that he sold 21/2 kathas of land in 1980 to Plaintiff, Bhabendra Pegu, but as per the sale deed, he sold more than 21/2 Kathas. In cross examination, he again stated that he had altogether 2 bighas of land including the land he sold and the oil pipeline was laid through his aforesaid 2 bighas of land. As per the aforesaid "jamabandi", some portion of the land was acquired in the year 1961 for laying the oil pipeline. It appears that the land in dispute was sold after acquisition of land of the vendor, Lahon Garo (PW2). If it is so, there is no land measuring 6 kathas 17 lechas. It is to find out how the vendor aforesaid could sell 2 kathas 11 lechas and 4 kathas 6 lechas to the Plaintiff and Defendant respectively.

13. Record shows that the Defendant filed a petition under Order 26, Rule 9 of the Code of CPC praying for appointment of Amin Commission to find out on which side of the pipeline, the land under Dag No. 292 (Part-Dag No. 885) 4 under K. Patta No. 144 of Village- Hengrabari Beltola Mauza purchased by the Defendant is located or existed. The said petition No. 901 of 2000 was rejected by the learned Civil Judge (Junior Division) No. 2, Kamrup vide order dated 13.11.2000 on the ground that it was filed at the fag end of the trial when the case was posted for argument and it was found to be a deliberate tactic to delay the disposal of the suit. The Defendant also filed Misc. Application No. 21 of 2005 on 19.1.2005, u/s 75 read with Order 26, Rule 9 of the Code of CPC before the learned Civil Judge (Junior Division) No. 2, Kamrup, Guwahati for issue of Commission for local investigation of the suit land and to ascertain the proper identification of the suit land and/or to call for a report of the Settlement Officer, Kamrup, Beltola Mauza (resettlement operation), Guwahati for ascertainment of

the respective plots of land of the Plaintiff and Defendant for effective disposal of the suit. The said application was also rejected by the learned Civil Judge (Junior Division) No. 2, Kamrup vide order dated 22.3.2005 mainly on the ground that both the parties have already adduced ample evidence and exhibited documents, which would help in adjudicating the case and there was no such need for local inspection.

14. Considering the peculiar facts and circumstances of the case, it is, in my considered view, necessary to enquire into the matter through Amin Commission for ascertainment of the location and existence of the suit land purchased/possessed by the Plaintiff and the Defendant. In my considered view, without ascertaining the said position, it would not be possible to come to a correct conclusion and adjudicate the matter.

For this purpose, the following additional issue is framed: -

Whether suit land measuring 2 kathas 11 lechas situates on the north of pipeline as described in the schedule of the plaint or in the south of the pipeline as shown in the revenue record?

Although, it is too late for such investigation/enquiry after such a long period of time and at the stage of second appeal, such enquiry, it has become essential for arriving at a right decision and in the interest of justice to remand the matter to the learned trial court, who shall appoint Amin Commission for local investigation and ascertainment of proper identification/location of the suit land and also call for the report of the Settlement Officer, Kamrup Beltola Mauza (re-settlement operation) and adjudicate the matter taking into consideration the pleadings of the parties and the oral and documentary evidence already adduced by them. The impugned judgment and decree dated 28.7.2006 passed by the learned Civil Judge (Senior Division) No. 2, Kamrup, Guwahati affirming the judgment and decree dated 30.9.2005 passed by the learned Civil Judge (Junior Division) No. 2, Kamrup in Title Suit No. 272 of 1996 are liable to be set aside.

15. In view of the above, the impugned judgment and decree dated 28.7.2006 passed by the learned Civil Judge (Senior Division) No. 2, Kamrup, Guwahati in T.A. No. 92/2005 as well as the judgment and decree dated 30.9.2005 passed by the learned Civil Judge (Junior Division) No. 2, Kamrup in Title Suit No. 272 of 1996 are set aside. The learned trial court shall notify the parties concerned and fix a date for their appearance and thereafter pass necessary order for appointment of Amin Commission as stated above and also call for report from the Revenue Officer concerned and thereafter, upon hearing the parties, shall decide the additional issue and dispose of the matter preferably within a period of 6(six) months from the date of receipt of the LCR. The parties shall not be allowed to lead/adduce fresh or additional evidence.

16. With the above observations and directions, this appeal stands disposed of. Send down the LC Rs to the learned Civil Judge (Senior Division) No. 2, Kamrup, Guwahati forthwith, who shall, in his turn, send the trial court's record

immediately for disposal of the title suit as directed above.